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CITATION

Cases—Continued

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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 31

UNITED STATES OF AMERICA, PETITIONER

v.

ROBERT PATRICK MORGAN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Appeals (R. 17–20) is reported at 202 F. 2d 67.

JURISDICTION

The judgment of the Court of Appeals was entered on February 5, 1953 (R. 20). On March 5, 1953, by order of Mr. Justice Jackson, the time for filing a petition for a writ of certiorari was extended to and including April 6, 1953 (R. 21). The petition was filed on April 1, 1953, and was granted on June 8, 1953 (R. 23). The jurisdiction of this Court is invoked under 28

U. S. C. 1254 (1). See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether United States District Courts have jurisdiction to entertain a motion in the nature of a writ of error *coram nobis* outside the scope of 28 U. S. C. 2255 to vacate a judgment of conviction on the ground of denial of counsel after the full term of sentence has expired.

2. Whether, if such jurisdiction exists, an allegation that respondent had not intelligently waived counsel, without any allegation as to his innocence or as to reasons for delay, was sufficient to require the court to hold a hearing.

STATUTE INVOLVED

28 U. S. C. 2255 provides in pertinent part:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.
>
> A motion for such relief may be made at any time.

> * * * If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.
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> * * * * *
>
> An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

STATEMENT

On December 18, 1939, in the United States District Court for the Northern District of New York, respondent pleaded guilty to an indictment which charged him with stealing certain letters from the mails and unlawfully removing the contents, in violation of what was then Section 194 of the Criminal Code [18 U. S. C. (1946 ed.)

the same, in violation of Section 218 of the Criminal Code [18 U. S. C. (1946 ed.) 347] (R. 1–5). He was thereupon sentenced to four years' imprisonment (R. 6, 7). He served out this term (R. 8).

In 1950, he was convicted of another offense in a New York state court, and was sentenced as a second offender to serve from seven to ten years (R. 8, 17). He is currently confined under that sentence (R. 8, 12).

On February 11, 1952, respondent applied to the United States District Court for the Northern District of New York for a common law writ of error *coram nobis*, seeking an order vacating and setting aside his conviction in that court on the ground that he had not been given the assistance of counsel and had not been informed of, and had not waived, his constitutional right to such assistance (R. 8). He did not offer any explanation for his failure earlier to assert such facts, nor did he allege that he was innocent of the crime charged.

The motion was opposed by the United States Attorney, and denied by the District Court, on the theory that it was, in effect, a motion under 28 U. S. C. 2255, and as such was insufficient because Morgan was not in custody under the sentence being attacked (R. 11–12).

The Court of Appeals, however, held that the petition invoked the jurisdiction of the court to vacate judgments for errors correctible at com-

mon law by *coram nobis*. This remedy, it thought, was not affected by the passage of Section 2255.[1] Accordingly, it remanded the case to the District Court for a hearing on the question whether respondent had in fact been represented by counsel at his federal trial or had intelligently waived such representation (R. 19, 20).[2]

[1] The same court had previously denied relief under Section 2255 to a prisoner in custody under a state sentence as a multiple offender in a case in which no claim for relief by writ of error *coram nobis* had been advanced. *United States* v. *Lavelle*, 194 F. 2d 202. Thereafter, in *United States* v. *Bradford*, 194 F. 2d 197, 201 (on rehearing), certiorari denied, 343 U. S. 979, the court had specifically left open the question decided in the instant case, whether "interposition by motion outside the Rules" would be justified where the movant was "in custody under the judgment of a state court, the duration of the sentence upon which depended upon the validity of the federal judgment."

[2] Petitioner apparently also applied to the United States District Court for the Western District of New York, the district in which he is confined under the state sentence, for a writ of habeas corpus seeking his release from custody on the same grounds as those alleged in the instant motion. That application was apparently inspired by the decision of the Court of Appeals for the Second Circuit in *United States ex rel. Turpin* v. *Snyder*, 183 F. 2d 742, holding that a person held in New York as a second offender after a prior conviction in a Wisconsin state court, could attack the Wisconsin judgment by habeas corpus in a federal court since he had no remedy in the courts of the state of conviction or the state of incarceration. The court in the instant case held that it had no record in the habeas corpus proceeding before it and that since petitioner "has an available remedy through a writ of *coram nobis* in the United States District Court for the Northern District, we can see no reason for discussing whether he might also avail himself of a writ of habeas corpus in the Western District" (R. 19–20). Subsequently, the Sec-

SPECIFICATION OF ERRORS

The Court of Appeals erred in holding:

1. That the District Courts have power to issue a writ of *coram nobis* or entertain a motion in the nature thereof beyond the scope of 28 U. S. C. 2255.

2. That District Courts have power to consider on such a motion the claim that the conviction is void because of denial of a right to counsel.

3. That a federal judgment of conviction may be collaterally attacked for errors dehors the record after the full term of sentence has expired.

4. That respondent's application was sufficient to require a hearing although it did not allege innocence of the crime or any reason for the delay in raising the objection.

SUMMARY OF ARGUMENT

I

A. The writ of error *coram nobis* was unknown in federal criminal practice until 1859 when an attempt to use an equivalent of the writ to reach errors of law apparent on the face of the record was rejected in *United States* v. *Plumer*, 3 Cliff. 28. Thereafter, it again disappeared from federal criminal practice until this Court in 1914, in

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ond Circuit has held that since, under the instant decision, *coram nobis* is available to a second offender to challenge the validity of a prior federal conviction, habeas corpus is not the proper remedy. *United States ex rel. Lavelle* v. *Fay*, 205 F. 2d 294.

United States v. *Mayer*, 235 U. S. 55, reserving the question whether *coram nobis* could ever be available in federal criminal cases, held that the writ did not lie to correct errors of law, or issues of fact, such as alleged partiality of a juror, which were cognizable on a motion for a new trial in term time. In federal courts, the remedy which developed for collateral attacks on criminal judgments for jurisdictional errors of law or fact was the remedy under the Habeas Corpus Act of 1867. After the concept of jurisdiction in habeas corpus had been expanded by this Court in recent years, some courts of appeals did hold that a motion in the nature of *coram nobis* was available in the sentencing court to reach similar bases for collateral attack, but the question of power was not resolved by this Court prior to the enactment of 28 U. S. C. 2255. Since this statutory remedy is, as to prisoners in custody, completely adequate to cover any relief which might be available on the broadest interpretation of *coram nobis*, the existence of the power to grant *coram nobis* relief has at present practical significance only in cases in which a sentence already fully served is being attacked. It is the Government's position that, even in this limited class of cases, the writ is not available.

B. In view of the fact that the writ was not an established mode of procedure in criminal cases, federal courts had no power to issue the writ even before the enactment of 28 U. S. C.

2255. Federal district courts are courts of limited jurisdiction which have only the power conferred upon them by Congress. Since there was and still is no statutory grant of power to issue writs of *coram nobis* as such, the power of lower federal courts in this respect must depend, if it exists, on the fact that such power is essential to the exercise of jurisdiction in criminal cases, or is such a traditionally recognized part of criminal jurisdiction that the grant of jurisdiction over criminal cases can be said to imply grant of power to issue such writs. But a writ which was not even mentioned in the decisions of the first seventy years of our history, was denied when first sought, and was not asserted to be available until more than seventy years later, can hardly be said to be so firmly established a remedy that power to issue it inheres in or is essential to the exercise of criminal jurisdiction.

Moreover, even if the writ ever was available in its common-law form, such non-statutory power to grant the writ would have been limited by its traditional, common-law scope. On this basis the writ would not reach the error here alleged, the denial of the right to counsel. The writ reached only errors of fact unknown to the trial court. The denial of counsel was a fact known to the trial court. Even in state courts, where the existence of the writ is firmly established, the writ has been held not to be available to reach the court's

failure to inform defendant of his right to counsel.

C. In any event, whatever vestiges of the common-law writ could be said to have existed in federal criminal practice before 1948 disappeared when Congress, by the enactment of 28 U. S. C. 2255, undertook to create, define, and limit a remedy in the sentencing court of generally similar character. In view of the limited jurisdiction of federal district courts, it is clear that the new remedy supersedes whatever nonstatutory power district courts may previously have had to vacate their judgments for errors of law or fact.

The legislative history shows that 28 U. S. C. 2255 was designed to substitute for habeas corpus a remedy in the nature of, but much broader than, *coram nobis*. And by defining that remedy, Congress clearly set its limits. Assuming, *arguendo*, that the writ of *coram nobis* was available at common law as a basis for attack on a sentence which had been completely served, when Congress has chosen to legislate in this field, and to shorten the time for seeking the remedy while broadening the grounds of its availability, the congressional definition must now govern in length as well as in breadth. *United States* v. *Mayer, supra.*

The principle that practice in the legislatively created district courts should be governed by statute is peculiarly appropriate at the present

time in the light of the recent revisions of the Judicial Code, the Criminal Code, and the Rules of Civil and Criminal Procedure. It ought to be true, as a practical as well as a theoretical matter, that the basic outlines of federal practice must appear in those documents so that he who reads may find there the extent of, and the limitations upon, the remedies available to him.

D. History and reason support the view that the duration of a federal sentence marks the limits of collateral attack upon a federal judgment of conviction in a criminal case. The major historical vehicle for collateral attack has been the writ of habeas corpus which, by its very nature, was limited to the period when a defendant was in custody. In providing the present substitute for habeas corpus, Congress carried over the historical precedent that relief must be sought while the prisoner is in custody.

There are sound reasons of policy for this limitation. Facts tend to become obscured with the passage of time. It would be difficult enough to establish the facts which give rise to the claim of invalidity; far more difficult is the task of proving the facts relating to the crime itself. The grounds for collateral attack seldom presuppose innocence, and the sustaining of such an attack does not adjudicate innocence. Yet, as a practical matter, the sustaining of such a claim as is here made, long after the crime was committed, is likely to have the effect of an adjudication of

innocence. It does not serve the interests of justice to allow a defendant thus to profit by his own delay in seeking relief that was available to him.

This Court has recognized that there must be some limitation to attacks on judgments. See *United States* v. *Smith*, 331 U. S. 469, 475. Of its own motion, in the revision of the Rules of Criminal Procedure, it changed a proposal that a motion for a new trial on newly discovered evidence be allowed at any time to the present provision of Rule 33 that such motions must be made within two years after entry of judgment. When the need for finality of judgments is considered in relation to the fact that the prisoner has an opportunity to challenge a judgment during the entire period he is incarcerated thereunder, the balance, we submit, lies in favor of a rule that collateral attack is limited to the period of custody.

II

At the very least, a prisoner seeking to attack a fully served sentence should be held to the duty of presenting to the court in which he makes his application some adequate explanation for his delay in failing earlier to assert his rights and some showing that he is innocent of the crime. Through such a requirement, long delayed collateral attack, which is for so many reasons undesirable, can at least be kept within bounds where

only those who can make some showing of inequity will be in a position to burden the courts with the task of resolving faded issues.

ABOUSSETT

More than twelve years after he had pleaded guilty to a federal offense, and eight years after he had completely served the sentence imposed for the offense, respondent for the first time asserted that his plea of guilty had been entered without knowledge of his right to the assistance of counsel. Recognizing that since respondent is not in custody under the federal judgment he is attacking, he is not entitled to the normal relief under 28 U. S. C. 2255 available to prisoners making such claims,* the court below revived a long disputed issue as to whether the federal courts have power in criminal cases to grant the ancient and obscure writ of error *coram nobis*, held that such

*The pertinent portion of Section 2255, which makes clear that the movant must be in custody under the particular judgment being challenged, reads as follows:

"A prisoner *in custody under sentence* of a court established by Act of Congress claiming the right to be released upon the ground that *the* sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose *such* sentence, or that *the* sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed *the* sentence to vacate, set aside or correct *the* sentence." [Emphasis supplied.]

See *United States* v. *Bradford*, 194 F. 2d 197 (C. A. 2), certiorari denied, 343 U. S. 979; *United States* v. *Lavelle*, 194 F. 2d 202 (C. A. 2); cf. *Crow* v. *United States*, 186 F. 2d 704 (C. A. 9).

power exists and is available on the basis of the facts alleged, and remanded the case to the District Court for a hearing to determine whether respondent could establish his right thereto. This result conflicts squarely with the subsequent decision in *United States* v. *Kerschman*, 201 F. 2d 682 (C. A. 7).

We believe that the court below erred in all aspects of its decision. We propose to show that there is at present no power in the federal courts to issue a writ of *coram nobis*; that there is in our jurisprudence no necessity for the exercise of such power; and that, even if it did exist, the application in the instant case is insufficient to present a basis for such relief because of the respondent's failure to allege innocence of the crime and adequate reasons for the delay in the assertion of the claimed rights.

I

There is no power in the federal district courts to issue a writ of error *coram nobis*

In our view, the decisive answer to the decision below is to be found in 28 U. S. C. 2255, which, while it affords relief broader than that available through common-law *coram nobis*, may be invoked only by one who is imprisoned under the sentence he attacks. This conclusion is best understood and fully confirmed when 28 U. S. C. 2255 is examined in the light of history. The history,

reviewed briefly below, reveals that the writ of error *coram nobis*, long unheard of and only sporadically considered following its tardy appearance in the federal courts, has probably never been available to attack federal criminal judgments.

What is perfectly clear, at any rate, is that 28 U. S. C. 2255 puts an end to the obscure effort to assign a federal jurisdictional role to common-law *coram nobis*. In this section and the expanded writ of habeas corpus, the federal prisoner finds ample means for relief from a sentence imposed in violation of some fundamental right. But there is no place in this remedial scheme for collateral attack after the sentence in question has been served. And this limitation on the jurisdiction of the federal courts is required not only by the authoritative congressional rules defining the jurisdiction of the federal courts, but by obvious practical considerations which make it fair and reasonable to declare a judgment of conviction final when the sentence it imposes has been served.

A. *The history of coram nobis in federal criminal practice shows that it never had any significant function.*

The writ of error *coram nobis* was succinctly described by this Court in *United States v. Mayer*, 235 U. S. 55, 68, as follows:

> These writs were available to bring before the court that pronounced the judg-

ment errors in matters of fact which had not been put in issue or passed upon and were material to the validity and regularity of the proceeding itself; as where the defendant, being under age, appeared by attorney, or the plaintiff or defendant was a married woman at the time of commencing the suit, or died before verdict or interlocutory judgment,—for, it was said "error in fact is not the error of the judges and reversing it is not reversing their own judgment." So, if there were error in the process, or through the default of the clerks, the same proceeding might be had to procure a reversal. But if the error were "in the judgment itself, and not in the process", a writ of error did not lie in the same court upon the judgment, but only in another and superior court.*

*The opinion goes on to state, on the authority of certain texts, that "In criminal cases, however, error would lie in the King's Bench whether the error was in fact or law." This statement, which implies that in criminal cases the writ of error *coram nobis* would lie for errors of law, while an accurate summary of the texts relied upon, is open to question. It seems to have resulted from failure to distinguish between the writ of error *coram nobis* to the same court and the writ of error to review questions of law which lay only to a higher court. Stephen in his *Commentary on the Laws of England* (1st Am. ed. 1846, v. IV, p. 456), speaks only of the writ of error "which lies from all inferior criminal jurisdictions to the Court of King's Bench" and in his *History of Criminal Law* (1883) makes no mention of the writ of error *coram nobis*. (See Chapter X, p. 306 ff.). The confusion may have arisen because at one time it appears to have been the practice on review by writ of error to remove the record from an inferior tribunal to the King's Bench by cer-

Despite the fact that the writ had so far fallen into disuse in England that Blackstone in his Commentaries made no mention of it (see *Pickett's Heirs* v. *Legerwood*, 7 Pet. 144, 147), the writ, or more frequently a motion which was its equivalent, was early used in civil cases to correct errors of fact of the traditional type described in the above quotation. Such limited use, but no further extension, was recognized, and apparently sanctioned although not expressly upheld, in early decisions of this Court. *Pickett's Heirs* v. *Legerwood, supra; Bronson* v. *Schulten*, 104 U. S. 410, 415; *Phillips* v. *Negley*, 117 U. S. 665.

In criminal cases, however, there seems to have been no attempt until very recent times to resort either to the writ itself or to any equivalent motion to raise issues of fact. In 1859, in *United States* v. *Plumer*, 3 Cliff. 28, 27 Fed. Cas. 561, an attempt was made to secure review by motion in the trial court, but the review thus sought was as to matters of law on the face of the record, the kind of error that could properly be reached by motion for a new trial or in arrest of judgment during term time. Judge Clifford in an ex-

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tiorari and then bring a writ of error *coram nobis*. See Chitty, *Criminal Law* (5th Amer. ed., 1847, v. 1, p. 749). The question has only academic interest since this Court in the *Mayer* case held that, whatever the former practice, there was in federal practice no basis for the conclusion that without statutory grant, federal District Courts could, after term time, correct their judgments for errors of law.

tensive opinion which foreshadowed the subsequent decision of this Court in *United States* v. *Mayer, supra*, held that federal courts could not "exercise any power, in a criminal case, not derived expressly or impliedly from an act of Congress" (3 Cliff. at 55), and that "there is no provision contained in the Judiciary Act which affords any support to the theory of the petitioner" that such review was available (*id.* at 62). He pointed out that "Seventy years having elapsed, or nearly so, since our judicial system was organized, the conclusion would seem to be a reasonable one that if there is any foundation for the right claimed to be exercised in this case, some trace of a prior exercise of it, or of a claim to exercise it in a criminal case, would be found in some reported decision of the Circuit or District Courts; but no such decision is referred to, nor is it even suggested in argument that any such right in a criminal case was ever before claimed in either of those courts" (p. 58).

Thereafter, the writ of error *coram nobis* disappeared from decisions relating to federal criminal practice until the decision of this Court in *United States* v. *Mayer, supra*, in 1914, 55 years later. There, ten months after his conviction and after expiration of the term, the defendant applied to the District Court to set aside the judgment on the ground, *inter alia*, that one juror when examined on his voir dire had concealed a bias against the defendant. The district

judge found as a fact "that neither the defendant nor his counsel had knowledge of the facts on which the motion was based until after the conclusion of the trial and the expiration of the term as to those counts upon which sentence had been imposed, and that these facts could not have been discovered earlier by reasonable diligence" (235 U. S. at 57). This Court held, nevertheless, that there was no power to grant relief, that for the defects alleged, including misbehavior of partiality of jurors and newly discovered evidence, the "remedy is by a motion for a new trial * * * which * * * cannot be entertained, in the absence of a different statutory rule, after the expiration of the term at which the judgment was entered" (p. 69). The Court stated (pp. 68–69):

> In view of the statutory and limited jurisdiction of the Federal District Courts, and of the specific provisions for the review of their judgments on writ of error, there would appear to be no basis for the conclusion that, after the term, these courts in common law actions, whether civil or criminal, can set aside or modify their final judgments for errors of law; and even if it be assumed that in the case of errors in certain matters of fact, the district courts may exercise in criminal cases—as an incident to their powers expressly granted—a correctional jurisdiction at subsequent terms analogous to that exercised at common law on writs of error *coram nobis* * * *, as to which we express

> no opinion, that authority would not reach the present case. This jurisdiction was of limited scope; the power of the court thus to vacate its judgments for errors of fact existed, as already stated, in those cases where the errors were of the most fundamental character, that is, such as rendered the proceeding itself irregular and invalid [*i. e.*, such errors "as where the defendant, being under age, appeared by attorney, or the plaintiff or defendant was a married woman at the time of commencing the suit, or died before verdict or interlocutory judgment"].

Since concealment of partiality by a juror was a fact unknown to both defendant and the court, which could be said to go to the fairness of the trial, an allegation of this kind would seem to raise an issue of fact rather than the kind of error of law involved in the *Plumer* case, *supra*. Thus, the *Mayer* decision not only held that *coram nobis* would not lie for errors of law, but also indicated that, in matters of fact, the writ could not be extended beyond the very limited scope for which it had been used at common law.

The *Mayer* decision is particularly interesting in the light of the fact that in the generation or so preceding it, the trend in the state courts had been toward increasing recognition of the right to *coram nobis* in criminal cases and expansion of the bases for the writ. In the leading case of *Sanders* v. *State*, 85 Ind. 318 (1883), the court

held that the writ would issue on the allegation of a defendant that his plea of guilty had been entered by duress through fear of mob violence. Thereafter, the decisions of many states reflect an increasing use of the writ of *coram nobis* to reach errors of fundamental character, including grounds, such as a coerced plea of guilty, not known to the common law. See Orfield, *Criminal Procedure from Arrest to Appeal,* 522 *et seq.* (1947); Freedman, *The Writ of Error Coram Nobis,* 3 Temple L. Q. 365 (1929); Notes, 10 Neb. L. Rev. 314 (1932); 37 Harv. L. Rev. 744 (1924); 11 Wis. L. Rev. 248 (1935–1936).

No attempt will be made here to discuss the various ramifications and limitations placed on the writ of error *coram nobis* in the course of its development in the state courts, many of which are covered by the articles cited immediately above. The significant fact for present purposes is that there was no such development, or even discussion of the development, in federal criminal practice, and that the difference became even more marked in the years following the *Mayer* decision. The reason for the difference is not hard to seek. There was at hand, in the Habeas Corpus Act of February 5, 1867, 14 Stat. 385, a remedy for basic injustice which had firm statutory basis and far greater historical dignity as a precedent. The year after the *Mayer* decision, in *Frank* v. *Mangum,* 237 U. S. 309, this Court

had before it the question whether a state conviction could be set aside on habeas corpus on a charge that the trial was dominated by mob violence, and although it declined to reverse denial of the writ in that case on the ground that the state courts had found that the allegations were not sustained, it clearly indicated that, on proper proof of such facts, habeas corpus would lie. The development of the writ of habeas corpus had been suggested by such earlier decisions as *Ex parte Nielsen*, 131 U. S. 176, and was greatly expanded thereafter by such decisions as *Moore* v. *Dempsey*, 261 U. S. 86, *Mooney* v. *Holohan*, 294 U. S. 103, and, of course, the leading case of *Johnson* v. *Zerbst*, 304 U. S. 458. See Holtzoff, *Collateral Review of Convictions in Federal Courts*, 25 B. U. L. Rev. 26 (1945). There was thus no need ordinarily to resort to the doubtful "inherent" power of District Courts to issue an obscure writ, the scope of which was at best severely limited, when a statutory remedy of great flexibility was at hand.

Despite this fact, it was only after the concept of jurisdictional error had been expanded in habeas corpus that the question of the power to issue writs of error *coram nobis* again arose in the Federal District Courts. The reasons are fairly evident. Prisoners who had failed to establish their allegations in a habeas corpus court were not averse to making another attempt in the sen-

tencing court;[7] there were prisoners who thought they might have a greater chance of success in the sentencing court in the first instance;[8] and, finally, there were those who had served out their sentences and could not seek redress by habeas corpus.[9] Thus there was revived the controversy which remained unsettled by the decision of this Court in *United States* v. *Mayer*, as to whether, in view of the limited jurisdiction of the federal courts, they had the power to review after term errors of fact such as were reviewable at common law by the writ of error *coram nobis*. As noted by the court below, some lower courts assumed the existence of jurisdiction to grant relief and also assumed that the relief to be had on such a motion was as broad as that available on habeas corpus.[10] But in most instances other grounds, such as failure to allege sufficient facts,[11] a prior adjudication on the merits,[12] or laches,[13] were found to warrant

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[7] *E. g., Kelly* v. *United States*, 188 F. 2d 489 (C. A. 9), certiorari denied, 324 U. S. 855, previous dismissal of petition for writ of habeas corpus affirmed, *Kelly* v. *Johnston*, 128 F. 2d 793 (C. A. 9), certiorari denied, 317 U. S. 699.

[8] *E. g., Robinson* v. *Johnston*, 118 F. 2d 998 (C. A. 9), certiorari denied, 314 U. S. 675, vacated, 316 U. S. 649.

[9] *E. g., Tinkoff* v. *United States*, 129 F. 2d 21 (C. A. 7); *United States* v. *Steese*, 144 F. 2d 439 (C. A. 3).

[10] *E. g., United States* v. *Steese*, 144 F. 2d 439 (C. A. 3); *Crowe* v. *United States*, 169 F. 2d 1022 (C. A. 4). *Contra: Young* v. *United States*, 138 F. 2d 838 (C. A. 5).

[11] *E. g., United States* v. *Moore*, 166 F. 2d 102 (C. A. 2), certiorari denied, 334 U. S. 849; *Spaulding* v. *United States*, 155 F. 2d 919 (C. A. 6).

[12] *E. g., Spaulding* v. *United States*, *supra*; *United States* v. *Monjar*, 64 F. Supp. 746 (D. Del.).

[13] *E. g., United States* v. *Moore*, *supra*.

denial of the writ. Probably for this reason the question of power to issue the writ never came before this Court for decision prior to the enactment of 28 U. S. C. 2255,[12] although on two occasions the Court has expressed serious doubts as to the appropriateness or necessity of this remedy in the federal system. *United States* v. *Smith*, 331 U. S. 469, 475, n. 4; *Taylor* v. *Alabama*, 335 U. S. 252, 259.

Since as to prisoners in custody under the sentence being attacked, the remedy created by 28 U. S. C. 2255, covering all possible grounds of collateral attack, is adequate to cover any relief which might be available on the broadest interpretation of *coram nobis*, the question of the existence of the power to issue writs *coram nobis* has at present practical significance only in cases such as that of respondent, in which a sentence already fully served is being attacked in the hope of reducing a sentence as a multiple offender.[13] It is the Government's position that even in this limited class of cases, the writ is not available.

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[12] The question was briefed by the Government in *Wells* v. *United States* (No. 11 Original, O. T. 1942), but was not reached by this Court in its decision, 318 U. S. 257.

[13] If a narrow interpretation is given to the word "custody" as used in 28 U. S. C. 2255, the question could also arise in relation to convicted persons against whom prison sentences are not imposed. That question has, so far as we know, actually arisen only in the case of *Viles* v. *United States*, 193 F. 2d 778 (C. A. 10), certiorari denied, 343 U. S. 915, in which the petition was denied on other grounds.

We show below (pp. 31–36) that by enacting 28 U. S. C. 2255, Congress "occupied the field," granting a remedy similar to but broader than *coram nobis* and sweeping aside any possible basis for review by the common-law writ, whatever its scope. Before turning to this crucial argument, however, we propose to demonstrate that, even apart from Section 2255, the relief respondent seeks would be unavailable.

B. *Since the writ had no established historical function in criminal practice, the courts had no power to issue it even before the enactment of 28 U. S. C. 2255, and certainly no power to expand the writ to cover alleged denial of the right to counsel.*

1. It is too well established to merit extended discussion that the federal District Courts are courts of limited jurisdiction and that "Congress, having the power to establish the courts, must define their respective jurisdictions." *Sheldon* v. *Sill*, 8 How. 441, 448; *Gillis* v. *California*, 293 U. S. 62, 66. Thus, even as to the power to grant writs of habeas corpus, Chief Justice Marshall, in *Ex parte Bollman*, 4 Cranch 75, 93–94, declared:

> Courts which originate in the common law possess a jurisdiction which must be regulated by the common law, until some statute shall change their established principles; *but courts which are created by written law, and whose jurisdiction is defined by written law, cannot transcend*

> *that jurisdiction.* * * * The reasoning from the bar, in relation to it, may be answered by the single observation, that for the meaning of the term *habeas corpus*, resort may unquestionably be had to the common law; *but the power to award the writ by any of the courts of the United States, must be given by written law.* [Emphasis supplied.]

Since there was and still is no statutory grant f power to issue writs of *coram nobis* as such, the ower of lower federal courts to do so can arise, ot from the power inherent in courts of common w, but only because such power is essential to he exercise of their jurisdiction in criminal ases [14] or because it is such a traditionally rec- gnized part of criminal jurisdiction, that the rant of jurisdiction over criminal cases can be aid to imply grant of a power to issue such rits. On the latter theory, it has been sug- ested that power to issue writs of *coram nobis* ay be inferred from the "all writs" statute now nbodied in 28 U. S. C. 1651 (a). Judge Biggs, issenting and concurring in *United States* v. *tecse*, 144 F. 2d 439, 446 (C. A. 3). But a writ hich was not even mentioned in the decisions f the first seventy years of our history, was

[14] The powers which inhere in the federal courts have been id by this Court to be only those which "cannot be dis- ensed with in a court, because they are necessary to the xercise of all others * * *." *United States* v. *Hudson*, 7 ranch 32, 34.

refused when first sought, not revived until more than seventy years later, and never recognized by this Court, can hardly be said to be so firmly established a remedy in criminal proceedings that power to issue it inheres in the grant of criminal jurisdiction or is essential to the exercise of criminal jurisdiction. And, by the same token, such a writ can scarcely be said to be one of the "writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law" within the scope of the all writs statute.

2. Moreover, even if the writ ever was available in criminal cases in its common law form, it is clear under the cases discussed above that any such nonstatutory, "inherent" power to grant the writ would be limited by its traditional, common-law scope.

The federal courts do not have the power of state courts to expand the scope of common-law remedies, if, indeed, they may be adopted. See *Bronson* v. *Schulten*, 104 U. S. 410, where this Court rejected a claim that the federal courts could assert the expanded *coram nobis* jurisdiction which was then being exercised in some state courts, declaring (104 U. S. at 416–417):

> The question relates to the *power* of the courts and not to the mode of procedure. It is whether there exists in the court the authority to set aside, vacate, and modify its final judgments after the term at

> which they were rendered; and *this authority can neither be conferred upon nor withheld from the courts of the United States by the statutes of a State or the practice of its courts.* [Emphasis supplied.]

See also *Phillips* v. *Negley*, 117 U. S. 665, 674, where this Court interpreted the *Bronson* decision as an "emphatic denial of the power of the court to set aside a judgment upon motion made after the term * * * except in the limited class of cases enumerated as reached by the previous practice under writs of error *coram nobis* * * *."[*] In short, federal courts did not have and do not now have power to expand the common-law scope of the writ.

On this basis, the writ, even if power to issue it did exist, would not reach the error here alleged, the denial of the right to counsel. Insofar as a trial court *knows* a defendant is unrepresented and fails to make clear the right to counsel, the error is one of law, which, as noted above (pp. 16–19), this Court has already held to have been unavailable on *coram nobis*. But even if the issue as it is tardily presented now be one of fact, the fact in question is not one which was unknown to the trial court, a pre-

[*] In the *Phillips* case, this Court held that despite a common-law expansion of the writ in Maryland permitting vacation of judgments in which there was irregularity, surprise, fraud and deceit in the procurement, the Supreme Court of the District of Columbia was without power to grant relief on any but the pre-existing bases for writs of *coram nobis*.

requisite to the granting of the writ. This requirement is the reef upon which applications for writs of *coram nobis* on account of lack of counsel have foundered in American state courts, where the existence of the writ is firmly established. *People* v. *Herod*, 112 Cal. App. 2d 764; *People* v. *James*, 99 Cal. App. 2d 476, 479; *State* v. *Pyle*, 173 Kan. 425; *Ex parte Gammon*, 255 Ala. 502; *State* v. *Turpin*, 255 Wis. 358; *House* v. *State*, 130 Fla. 400; *Snell* v. *State*, 158 Fla. 431, certiorari denied, 331 U. S. 830; *People* v. *Parcora*, 358 Ill. 448.[16]

There are, it is true, some jurisdictions—for example, New York, Indiana, and North Carolina—where constitutional rights, including right to counsel, may be vindicated by proceedings in the form of *coram nobis*,[17] habeas corpus not being ordinarily available for that purpose.[18] But

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[16] In the federal system, *Gilmore* v. *United States*, 129 F. 2d 199 (C. A. 10), held that denial of counsel was not within the narrow scope of *coram nobis* as defined by this Court in the *Mayer* case. In *Bell* v. *United States*, 129 F. 2d 290 (C. A. 5), the court noted that there was no precedent for granting a new trial after term on grounds that right to counsel had been denied, but no decision as to the propriety of the petition was required since on the record it appeared that petitioner had not been deprived of his right.

[17] *Matter of Hogan* v. *Court of General Sessions*, 296 N. Y. 1; *State* v. *Superior Court of La Porte County*, 219 Ind. 17; *In re Taylor*, 230 N. C. 566.

[18] *Matter of Morhous* v. *New York Supreme Court*, 293 N. Y. 131, 139; *State ex rel. Barnes* v. *Howard*, 224 Ind. 107; *In re Taylor*, 229 N. C. 297.

such use of *coram nobis* is an expedient necessitated by the want of other means of relief, and represents an expansion of the ordinary function of the writ at common law—an expansion, which, as noted above, is beyond the power of the federal courts.*

In this connection, the history of Rule 33 of the draft of the Federal Rules of Criminal Procedure (discussed below, pp. 41–42, in another connection) is illuminating. As it appeared in Rule 35 of the Advisory Committee's draft, this Rule would have provided that "A motion for a new trial based on the ground of newly discovered evidence or on the ground that the defendant has been deprived of a constitutional right may be made at any time before or after final judgment * * *." Federal Rules of Criminal Procedure, Report of the Advisory Committee (1944), Rule 35. Professor Dession, a member of the Supreme Court Advisory Committee on Rules of Criminal Procedure, has explained the pro-

* It is noteworthy that in Illinois, where *coram nobis* has been resuscitated by statute (Ill. Rev. Stat. 1951, ch. 110, Par. 196), it was held to be inapplicable to remedy a lack of counsel. *People* v. *Parcora*, 358 Ill. 448. This holding, coupled with the narrow scope of inquiry available in habeas corpus in Illinois, under which denial of counsel was not a ground for issuance of the writ (*Smith* v. *Bennett*, 401 Ill. 403), created a necessity for the Illinois Post Conviction Act (Ill. Rev. Stats. 1951, ch. 38, Pars. 826–32), which, like Section 2255, established a statutory remedy for persons imprisoned in violation of their constitutional rights.

vision for claiming deprivation of a constitutional right as follows:**

> "Since such an issue may now be raised by habeas corpus without time limit, the Committee's thought was that there would be some advantage in permitting the issue to be raised by motion in the district where the defendant was originally tried, since the judicial records—and, usually, persons who would have knowledge—are there. Habeas corpus proceedings must be instituted in the district where the petitioner is confined, and this is more often than not at some distance.

This attempt by the Committee to provide for relief in the sentencing court where constitutional rights were denied, relief now available under Section 2255, was considered a new remedy analogous to, and perhaps a substitute for, habeas corpus (*Proceedings, supra* note 20, p. 230), but wholly distinct from *coram nobis*, which as Professor Dession noted, reached only "fundamental errors of fact unknown to the trial court at the time * * *" of conviction. 56 Yale L. J. at 233. Thus, although the proposed Rule provided for collateral attack on constitutional grounds by motion in the sentencing court, the Advisory Com-

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** Dession, *The New Federal Rules of Criminal Procedure:* II, 56 Yale L. J. 197, 233 (1947); *Federal Rules of Criminal Procedure with Notes and Proceedings*, N. Y. U. School of Law, 1946, p. 206.

mittee in its note to this Rule in the Second Preliminary Draft stated:

> No express provision is made with respect either to providing for relief or to barring relief under the common law writ of error *coram nobis* * * *."[11]

If providing relief from constitutional error were actually a normal or, even an acceptable function of *coram nobis*, there could have been no such complete neutrality with regard to the writ.

C. *Insofar as 28 U. S. C. 2255 creates a new remedy by which violations of constitutional rights going to the jurisdiction of the sentencing court may be remedied, the statute provides the exclusive remedy for such defects.*

Whatever vestiges of the common-law writ of error *coram nobis* could be said to have existed in federal criminal practice before 1948, and whatever its amorphous scope, the writ has no place at all in federal practice since Congress, by the enactment of 28 U. S. C. 2255, undertook to create, define, and limit a remedy in the sentencing court of generally similar character. It is clear that this new remedy supersedes whatever nonstatutory power District Courts may previously have had to vacate their judgments for errors of law and fact.

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[11] According to Professor Dession, "The ambiguity in the Rule is not inadvertent, but merely reflects lack of general agreement on an appropriate solution." 56 Yale L. J. at 234.

The history and purpose of Section 2255 have been reviewed by this Court in *United States* v. *Hayman*, 342 U. S. 205, 210–219. As the Court there noted, the section originated with the Judicial Conference, and significant interpretations appear in the memoranda prepared in connection with the Judicial Conference bill. These documents make clear that Congress has greatly expanded the scope of relief available in the sentencing court as compared to that which might have been obtained by a common-law writ of error *coram nobis*. The Habeas Corpus Committee in its report accompanying the bills submitted at the 1943 Session of the Judicial Conference indicated that it proposed to provide for federal prisoners, as a substitute for habeas corpus, "another remedy by motion in the nature of writ of error *coram nobis* to test the constitutional validity of the judgments under which they are imprisoned." Since, as we have seen, the common-law writ of error *coram nobis* served only to raise questions of fact not previously known to the sentencing court, it is clear that it could not reach all the bases for collateral attack available in habeas corpus. The clear implication is that Congress in enacting Section 2255 created a new, broader remedy, equivalent in scope to habeas corpus but, like *coram nobis*, brought in the sentencing court.

This inference is substantiated by a statement prepared by the Habeas Corpus Committee at the

request of the Chairmen of the House and Senate Judiciary Committees." After first setting forth the causes underlying the proposed legislation—*i. e.*, the vast increase in habeas corpus applications and the evils attendant thereon—the Committee fully explained the way in which the bills were to remedy the situation, and with respect to Section 2 of the jurisdictional bill, the forerunner of present Section 2255, stated:

> This section applies only to Federal sentences. It *creates* a statutory remedy consisting of a motion before the court where the movant has been convicted. The remedy is in the nature of, *but much broader than, coram nobis*. The motion remedy broadly covers all situations where the sentence is "open to collateral attack." As a remedy, it is intended to be as broad as habeas corpus. [Emphasis supplied.]

There is nothing inconsistent, as the court below seems to have thought, between the purpose to provide a substitute for habeas corpus and the statement that the remedy is in the nature of, but much broader than, *coram nobis*. The substitute for habeas corpus which Congress chose was a motion like *coram nobis*. And by defining the remedy, Congress clearly set its limits. Assum-

[*] The pertinent portions of this Statement were incorporated in the Judiciary Committee's favorable report on S. 20 (the successor in the 80th Cong., to S. 1451, the original "jurisdictional bill" introduced in the 79th Cong.), S. Rep. 1526, 80th Cong., 2d Sess.

ing, *arguendo*, that the writ of *coram nobis* was available at common law as a basis for attack on a sentence which had been completely served, it is still true that when Congress chose to legislate in this field, and to shorten the period of availability while broadening the subject matter of the remedy, the Congressional definition of the remedy must govern in length as well as in breadth. As Chief Justice Marshall said in *United States* v. *More*, 3 Cranch 159, 173, referring to the appellate jurisdiction of this Court in criminal cases:

> * * * as the jurisdiction of the court has been described, it has been regulated by congress, and an affirmative description of its powers must be understood as a regulation, under the constitution, prohibiting the exercise of other powers than those described.

The conclusion that Section 2255 defines and exhausts the remedy available in the sentencing court would follow even if the words *coram nobis* had never appeared in the legislative history of Section 2255. On this aspect of the case, as in others, the decision of this Court in *United States* v. *Mayer* is both revealing and controlling. As noted above, fn. 4, p. 15, this Court in the *Mayer* case assumed that at common law the writ of *coram nobis* was available in criminal cases to reach errors of law appearing on the record. It nevertheless held that in "view of the statutory

and limited jurisdiction of the Federal District Courts, and *of the specific provisions for the review of their judgments on writ of error*" (emphasis supplied), the courts were without power to set aside their judgments after term for errors of law. Manifestly, the specific provisions for review to which the *Mayer* decision referred did not specifically repeal whatever review of errors of law on *coram nobis* was available at common law. The repeal resulted, this Court in effect held, from the fact that Congress had legislated in the field. 28 U. S. C. 2255 is even more directly and specifically legislation in the field covered by *coram nobis* than was legislation relating to review by writ of error. It seems clear, therefore, that the remedy created by such legislation is exclusive and that federal courts have no power to issue a writ of *coram nobis* beyond the limits fixed by 28 U. S. C. 2255.

The principle that practice in the legislatively created District Courts of the United States is governed by congressional legislation as implemented by the authorized rule-making power is even more appropriate to present day practice than it may have been in the earlier period of our history when the governing principles were first announced. Since 1946 there have been revisions of the Rules of Criminal and Civil Procedure,[22]

[22] The writ of error *coram nobis* has been expressly abolished for civil cases by Rule 60 (b), F. R. Civ. P. On the basis of this fact, the Court of Appeals for the Seventh Cir-

of the Criminal Code and the Judicial Code. In view of the extent and specificity of these revisions, it ought to be true, as a practical as well as a theoretical matter, that the basic outlines of federal practice must appear in those documents so that he who reads may find, not only the extent of, but the limitations upon, the remedies available to him. The time for searching ancient common-law precedents as to federal procedure has long since passed.

D. *On the basis of history and reason, duration of the sentence should mark the limits of collateral attack.*

If our argument to this point is corect, the end of a sentence under a federal judgment of conviction terminates the opportunity for collateral attack on the judgment.* This conclusion, we submit, is not only required by the jurisdictional scheme Congress created, but is aptly designed to fulfill the ends of fairness and practicality in the administration of federal criminal justice.

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cuit held in *United States* v. *Kershman*, 201 F. 2d 682, that the writ was not available to a defendant in criminal cases. We do not rely on this reasoning. For though at common law the writ commenced a separate proceeding, presumably civil in nature, a motion in lieu of the writ was early accepted as an equivalent. *Pickett's Heirs* v. *Legerwood*, 7 Pet. 144.

* We are not here concerned with the limited situation covered by Rule 35, F. R. Crim. P. where the sentence is illegal on the face of the record. In such a situation the distinction between void and voidable judgments is deemed applicable, and illegality on the face of the record can be attacked at any time. *DeBenque* v. *United States*, 85 F. 2d 202 (C. A. D. C.), certiorari denied, 298 U. S. 681.

It is true that in this case, as in others, the respondent in his motion papers alleges an injury, the consequences of which he is still suffering despite the completion of his sentence. Cf. *Fiswick* v. *United States*, 329 U. S. 211, 220–223, holding that service of a sentence did not render an appeal from the judgment of conviction moot. In our jurisprudence, however, many rights are lost because of failure to make timely assertion of them, even when the failure may be due to ignorance. Title to property may be lost by failure to oust a trespasser during a period of adverse possession; a cause of action is lost if it is not brought within the applicable period of limitations. Similarly, in the field of criminal law, a defendant who does not take a timely appeal may have to suffer the consequences of a judgment which would have been set aside had he sought review. Cf. *Sunal* v. *Large*, 332 U. S. 174. So here, the failure to make a collateral attack on the judgment of conviction during the long period of his sentence when respondent had a remedy available to him for this purpose (by habeas corpus) bars the relief he now seeks.

As we have noted (pp. 20–21, *supra*), the major historical vehicle for collateral attacks on federal judgments of conviction before the enactment of 28 U. S. C. 2255 was the writ of habeas corpus. This, by its very nature, carried its own period of limitations, for it was available only where a defendant was in custody and the writ would be

effective to release him from custody. Cf. *McNally* v. *Hill*, 293 U. S. 131. In providing the present substitute for habeas corpus, Congress, although declining to fix a uniform period of limitations (see *United States* v. *Hayman*, 342 U. S. at 216 n.), carried over the historical precedent that relief must be sought while the prisoner is in custody under the sentence being attacked. That limitation, we submit, measures the life of collateral attack.

Manifestly Congress has the power to impose a period of limitations on collateral attacks on judgments, just as it can fix a period for a motion for a new trial, for appeal, or for taking any other procedural step. There is no constitutional necessity to provide further remedies when appropriate opportunities to seek relief by judicial process have been neglected. See *Gayes* v. *New York*, 332 U. S. 145. As this Court said in *Yakus* v. *United States*, 321 U. S. 414, 444:

> No procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.[28]

[28] See Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362, 1369 (1953), where the author states: "* * * As Justice Holmes said in the *Rock Island* case [*Rock Island, Ark. & La. Ry.* v. *United States*, 254 U. S. 141, 143] 'Men must turn square corners when they deal with the govern-

The reasons which have led to the enactment of various statutes of limitations in civil and criminal actions support the view that there should be some finality against collateral attack for criminal judgments. Collateral attack usually involves an issue of fact outside the record. This is particularly true as to convictions entered before the federal court reporter system was developed. With the lapse of time it becomes increasingly difficult to resolve such issues of fact. In this very case, for example, the trial judge, whose alleged failure to inform respondent of his right to counsel is the basis for the collateral attack, is dead. Whether after 12 years important witnesses and documents involved in the original proceedings are still available is not revealed by the record. It may be assumed, however, that 12 years is long enough for the actual happenings with respect to counsel to have become exceedingly difficult of proof, if not wholly obscured.[26]

Moreover, an anomalous situation is created if the collateral attack succeeds. Collateral attack on bases such as that here advanced does not pre-

ment.' That's true of constitutional rights generally. * * * There isn't often a constitutional right to a second bite at the apple."

[26] The difficulties encountered when many years are allowed to elapse before seeking to raise objections of this nature are illustrated by *United States* v. *Rockower*, 171 F. 2d 423 (C. A. 2), certiorari denied, 337 U. S. 931, where by the time a motion for vacation of judgment was filed the trial judge, the commissioner, and the prosecutor had died, and the reporter's minutes were no longer available.

suppose, and certainly does not adjudicate, innocence. Yet it is likely to have the effect of an adjudication of innocence, for difficult as may be the proofs as to the actual happenings in the court room at the time of trial or plea, the difficulty of trying to prove the crime would be even greater. Furthermore, since no further sentence could be meted out on the retrial, there would inevitably be an inclination not to attempt the difficult task of a retrial. It does not serve the interests of justice to allow a defendant thus to profit by his own delay in seeking relief that was for many years available to him and unsought.

Conceivably there could arise a case in which a defendant who was innocent was truly ignorant of the remedies available to him until after the sentence had been fully served. To say that such a person is nevertheless without remedy may seem harsh. But any period of limitation can produce an inequitable result in some particular factual situation. For that unusual situation, the avenue of executive clemency is always open. In the over-all administration of justice—when the desirability of some finality to judgments is considered in relation to the fact that collateral attack is permitted during the period, often a long period, when the incentive to overthrow the judgment is the greatest because of the imprisonment it entails, and in relation to the fact that, as this Court well knows, any decision as to possible grounds of collateral attack is soon common

knowledge in federal prisons"—we submit that the balance lies in favor of a rule that collateral attack is limited to the period of custody.

The view that there should be some limitation to attacks on judgments has been expressed, at least implicitly, by this Court on two recent occasions. In *United States* v. *Smith*, 331 U. S. 469, the Court held that a trial judge could not on his own motion grant a new trial in the interests of justice after the time fixed by the rules had expired. It concluded (p. 476) that power to grant new trials without limit of time was incompatible with the interest of justice in reaching "a decision on the propriety of a trial * * * as soon after it has ended as is possible, * * * [before] the trial's story has taken on the uncertainty and dimness of things long past."

Even more revealing for present purposes is the history of Rule 33, F. R. Crim. P. The final draft (then Rule 35) submitted to this Court by the revisers proposed, in addition to the remedy by way of a motion for violation of a constitutional right (see *supra*, pp. 29–31), that the rule permit a motion for a new trial on the ground of newly discovered evidence to be made "at

[11] *Johnson* v. *Zerbst*, 304 U. S. 458, was decided in 1938. Respondent was sentenced in 1939 to a four-year term. That the *Zerbst* decision was well known to federal prisoners is shown by the number of reported decisions in which claims of lack of counsel were raised. See Holtzoff, *op. cit. supra*, 25 B. U. L. Rev. 42–43, fn. 55. There were undoubtedly numerous additional unreported cases.

any time." See *Federal Rules of Criminal Procedure with Notes and Proceedings* (N. Y. U. School of Law, 1946), p. 206. This Court, on its own initiative, limited to two years the period within which to move for a new trial on newly discovered evidence. Thus, even as to newly discovered evidence, which by definition relates to matters which could not have been known at the trial, and even though newly discovered evidence may in some cases actually establish innocence, this Court felt that some period of limitation against judicial action to set aside criminal judgments was desirable. This Court must have thought that the rare case of actual innocence could be left for executive action, and that, in the over-all picture, a period of limitations was more compatible with the interests of justice than an unfettered opportunity to assert the claim of new evidence.

II

If collateral attack is to be permitted after sentence has been served, it should be allowed only where there is adequate explanation for the delay and an allegation and some proof of innocence

Even if collateral attack were in some circumstances available after the sentence in question had been served, we think the respondent's case would fail. For the reasons we have just reviewed (pp. 36–42, *supra*), a defendant should at least be held to the duty of presenting to the court

in which he makes his application some adequate explanation for his delay in failing earlier to assert his rights and some showing that he is innocent of the crime for which the sentence under attack was imposed. In this way, long delayed collateral attack, which is opposed to the public interest for many reasons, can at least be kept within bounds where only those who can make some showing of inequity will be in a position to burden the courts with the task of resolving faded issues.

These requirements have the support of authority, ancient and modern, as well as the support of reason. An applicant for relief under the *coram nobis* power has traditionally been held to a reasonable degree of diligence in asserting his claim that the judgment entered against him is void due to some alleged error of fact. *Bronson* v. *Schulten*, 104 U. S. 410; *People* v. *Lumbley*, 8 Cal. 2d 752, 761; *People* v. *Kelly*, 35 Cal. App. 2d 571, 575; *People* v. *Vernon*, 9 Cal. App. 2d 138, 142-143; *People* v. *Harincar*, 49 Cal. App. 2d 594, 596; *Irwin* v. *State*, 220 Ind. 228. Interestingly, the Second Circuit itself, in a prior decision, *United States* v. *Rockower*, 171 F. 2d 423 (C. A. 2), certiorari denied, 337 U. S. 931, to which no reference was made in the decision below, found it unnecessary to pass on the question of power to issue writs of error *coram nobis* since the enactment of 28 U. S. C. 2255, "for the closely

analogous case of *United States* v. *Moore*, 7 Cir. 166 F. 2d 102 [certiorari denied, 334 U. S. 849] * * * seems to us to point to the appropriate decision." (171 F. 2d at 425.) The *Moore* case which involved facts identical to those of both *Rockower* and the present case,** had affirmed denial of Moore's motion on the following grounds:

> (1) that there must be a showing of facts tending to prove a valid defense or at least a possibility of proving innocence upon retrial;
>
> (2) that the movant had too long slept on his rights; and
>
> (3) that the infirmity, if any, in the petitioner's incarceration as a multiple offender should be attacked directly in the New York courts.*

** Moore was indicted in the District Court for the Eastern District of Illinois in 1928, pleaded guilty, and was sentenced to the penitentiary for a term of two years. After completing his term, Moore, in 1938, was sentenced to twenty years' imprisonment as a second felony offender in New York. In 1946, he filed a petition to vacate the judgment rendered in 1928, alleging that at the time he entered his plea he was uninformed that he was entitled to counsel, and that he did not waive counsel.

* We are not concerned in this case with the problem of whether New York can, in interpreting its recidivist statute, decline to give effect to a sentence imposed without benefit of counsel. While a state court cannot vacate the judgment of a federal court, we see no reason why a state court could not, if it so chose, decline to treat a federal judgment imposed without counsel as a prior offense for the purposes of its multiple offender law. But whether it does or does not

The *Moore* case was followed in *Bice* v. *United States*, 177 F. 2d 843 (C. A. 4), affirming 84 F. Supp. 290 (D. Md.) and *Farnsworth* v. *United States*, 198 F. 2d 600 (C. A. D. C.), certiorari denied, 344 U. S. 915. The same grounds apply here and bar the relief granted by the court below. The respondent did not even allege innocence of the crime, much less offer any facts with respect to it, and he advanced no explanation for his long delay in making the assertions claimed to invalidate a twelve-year-old judgment.

We think that opportunities for wishful thinking and imaginative reconstruction of events after the lapse of many years are so great that the overall interests of justice would best be served by holding collateral attack limited to the period of incarceration. But, certainly, no collateral attack after service of sentence should be permitted unless a defendant can show reasonable probability that he was wrongfully convicted and that he has not slept on his rights.

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do so is not important here, since no federal right is involved. As we have shown, *supra*, p. 38, there is no federal constitutional right to have a chance to attack a judgment, even on constitutional grounds, where opportunity to challenge was not availed of during the time permitted therefor.

CONCLUSION

For the foregoing reasons, we respectfully submit that the judgment of the Court of Appeals should be reversed.

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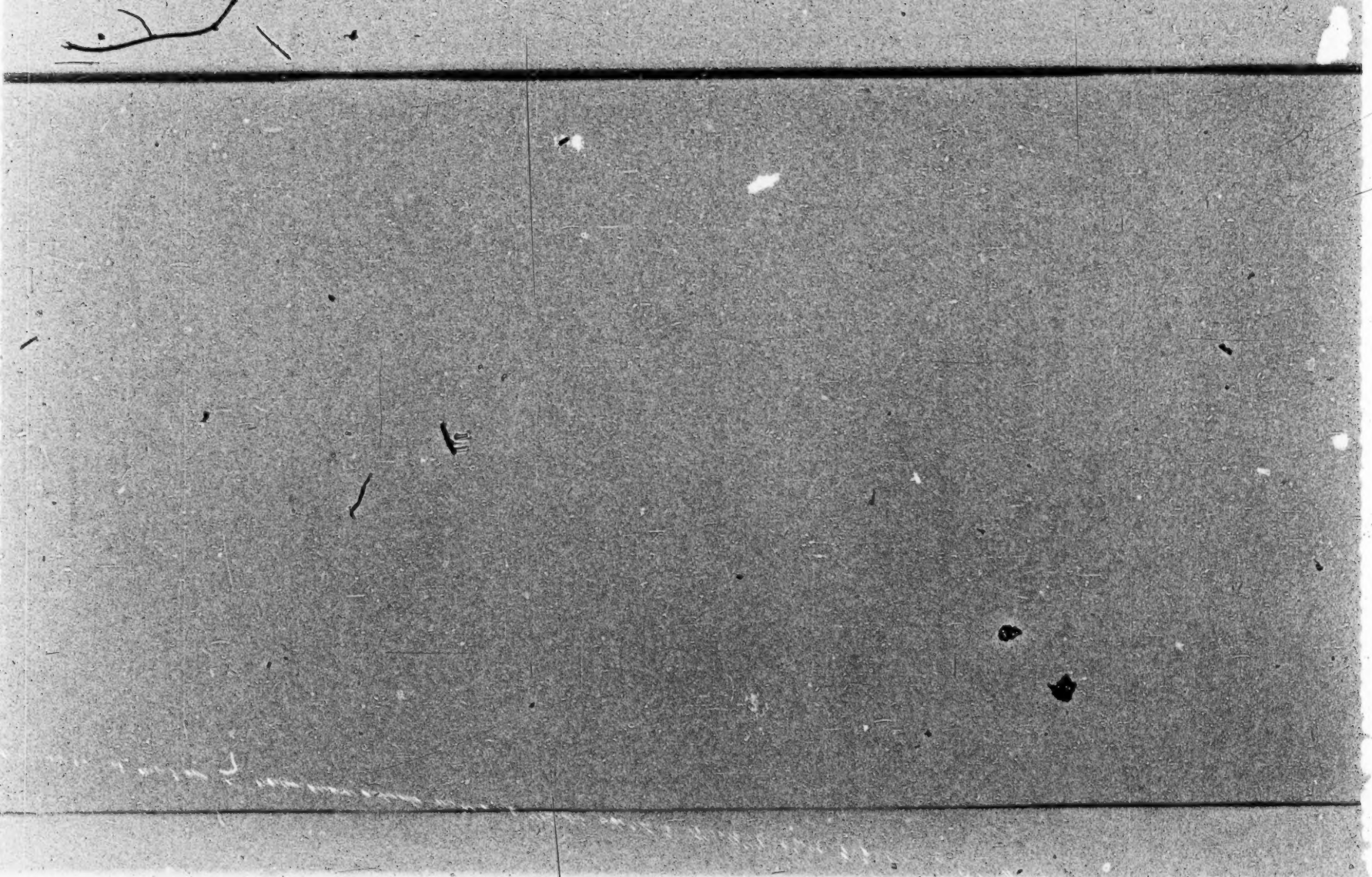

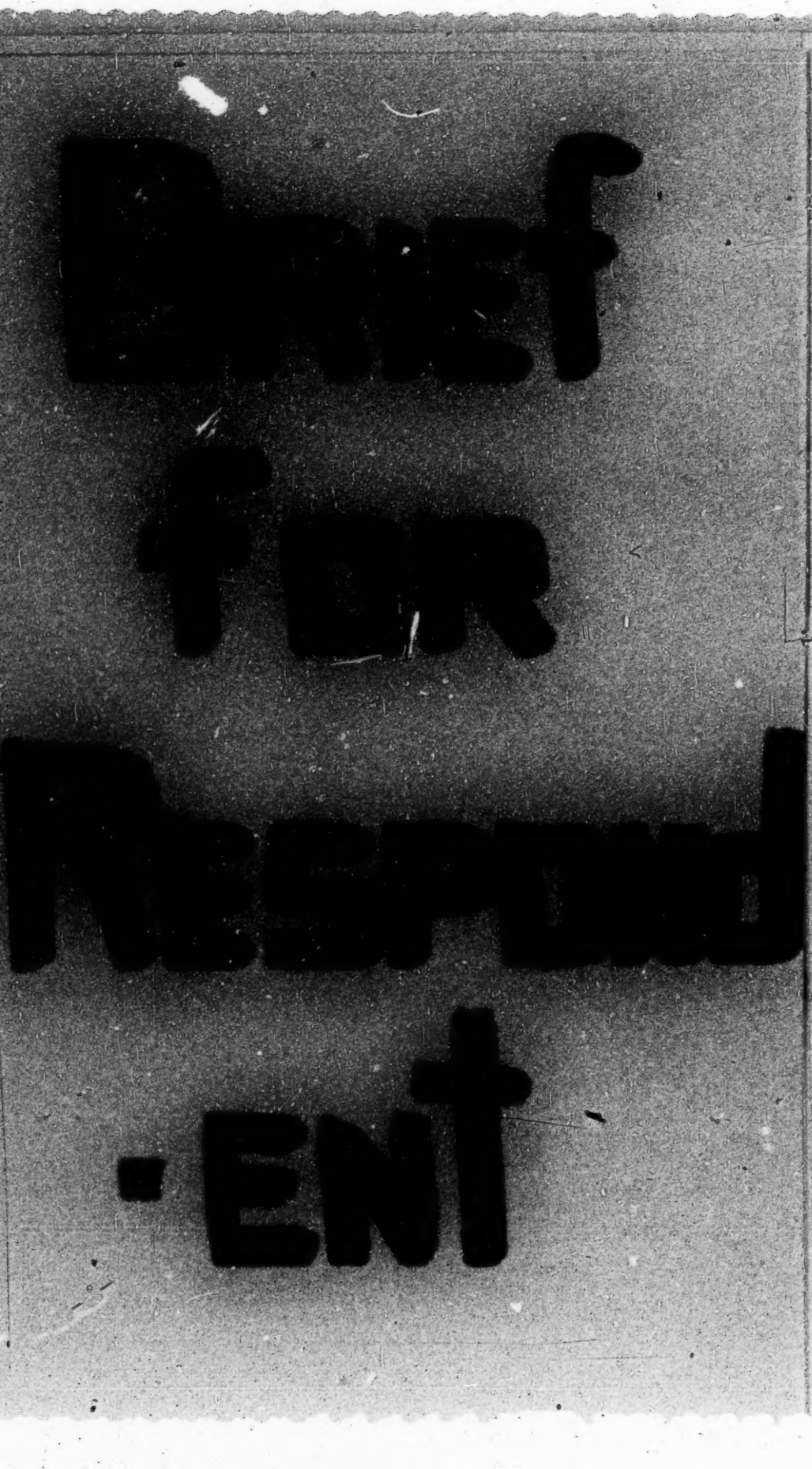
Brief
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Respond
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OCTOBER TERM, 1953

No. 31

UNITED STATES OF AMERICA,
Petitioner,

vs.

ROBERT PATRICK MORGAN

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BRIEF FOR ROBERT PATRICK MORGAN

ROBERT PATRICK MORGAN,
Pro Se.

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BRIEF FOR ROBERT PATRICK MORGAN

Opinion Below

The opinion of the Court of Appeals (R. 17-20) is reported at 202 F. 2d 67, 66 Harv. L. Rev. 1137.

Question Presented

1. Whether due process demands that corrective judicial process *in the nature of coram nobis* be available to expunge a void judgement *when all other avenues of judicial relief are closed to a prisoner.*

Statement

On December 18, 1939, respondent Robert Patrick Morgan—then nineteen years old—was arraigned in the United States District Court for the Northern District of New York, on Indictment No. 28366, which contained eight counts involving the theft of three letters (R. 1-5).

On the same day of his arraignment he pleaded guilty, judgement was pronounced and he was immediately sentenced to be imprisoned in the Federal Reformatory at Chillicothe, Ohio for the term of four years (on each of the eight counts of the Indictment), sentences to run concurrently (R. 5-7). He has since served the full time under these sentences.

On December 7, 1950, respondent was convicted of attempted burglary in the third degree, in the Onondaga County Court, Syracuse, New York, and because of his prior federal conviction in 1939, he was sentenced to from seven to ten years' imprisonment under the New York State Multiple Offender Law (N. Y. Penal Law Section 1941). He is currently confined in Attica Prison, Attica, New York pursuant to that sentence (Application for a Certificate of Probable Cause, dated September 12, 1952 filed in the court below).

On February 11, 1952 respondent moved the United States District Court for the Northern District of New York for an order to expunge from the record its judgement of conviction dated December 18, 1939, under Indictment No. 28366 on the ground that the said judgment was void. Respondent set forth as grounds for moving the court to expunge its judgment—that he was unaware and not advised of his right to the assistance of counsel during the earlier proceedings before that court; did not have the assistance of counsel; did in no way intelligently waive his right to

counsel; and the conviction was obtained by unfair methods (R. 8-9).

The respondent's notice of motion (R. 10) was opposed by the United States Attorney in his Answer filed March 10, 1952 (R. 11) in which he

> "2. Admits that insofar as the record discloses, the defendant was not represented by counsel on said arraignment and plea."

(R. 12).

The United States District Court for the Northern District of New York "decided that questions of law and also practical questions were raised" (R. 13), and assigned counsel to represent the respondent in that proceeding.

Without considering the merits—the court denied itself the jurisdiction to entertain the motion in a Memorandum-Decision which reasoned that although the motion was in the nature of an application for a writ of error coram nobis, it was in fact a motion under the provisions of Title 28 U. S. C. A. § 2255 and relief under the provisions of that section is only available to prisoners presently in federal custody.

Apparently believing there to be merit in respondents' application the court concluded:

> "The decision here does not foreclose the petitioner from all relief." (R. 14),

and quoted this Court:

> "Nowhere in the history of Section 2255 do we find any purpose to impinge upon prisoners' rights at collateral attack upon their convictions. On the contrary, the sole purpose was to minimize the difficulties encountered in habeas corpus hearings by affording the same rights in another and more convenient form.
> United States v. Hayman, supra, at 219" (R. 14)

but left open the procedure respondent was to follow to attain relief.

The respondent then applied to the United States District Court for the Western District of New York (which includes Attica Prison, wherein Morgan was confined, 28 U. S. C. A. § 2241 et seq.) for a Writ of Habeas Corpus seeking the same relief as in his application to the Northern District Court. The Hon. John Knight, District Judge, denied issuance of the writ by a letter dated June 20, 1952, stating:

> "This Court has no jurisdiction of your matter until you have exhausted all available remedies in the State Courts."

(See Record on Appeal *United States ex rel. Morgan* v. *Walter B. Martin*, as Warden of Attica Prison), (R. 18, 19).

Following the advice of Judge Knight, and notwithstanding the recent pronouncement of the Court of Appeals of the State of New York (300 N. Y. 107), the respondent brought a coram nobis proceeding in the Onondaga County Court (wherein he was sentenced as a second offender).

Onondaga County Court Judge Breed by a decision dated September 15, 1952, correctly interpreted the law of the state of New York, stating:

> "A defendant may not in this state challenge a judgement of a court of another jurisdiction by coram nobis —If the defendant decides to attack the Federal judgement he must do so in the court where such judgement was rendered. Until he has succeeded in vacating it the courts of this State have no alternative but to treat the conviction as an effective predicate for multiple offender punishment under Section 1941 of the Penal Law . . ."

On October 7, 1952 the court below granted respondent a Certificate of Probable Cause from the denial of the motion in the nature of coram nobis by the Northern District Court

and the denial of habeas corpus by the Western District Court and appointed counsel for the respondent through the Legal Aid Society.

The Court of Appeals held that if respondent could prove he was deprived of his right to counsel at the trial in the Northern District as is supported by the record—such a denial was an error of fundamental character rendering the trial invalid—and remanded the case for a hearing (R. 19).

The Court of Appeals further held that since respondent had an available remedy of coram nobis in the Northern District Court the appeal from the denial of habeas corpus would be dismissed.[1]

This court allowed certiorari in *United States of America* v. *Robert Patrick Morgan* wherein the Court of Appeals reversed the order of the Northern District Court—and denied a petition for a writ of certiorari in *United States ex rel. Robert Patrick Morgan* v. *Walter B. Martin*, as Warden of Attica Prison, wherein the Court of Appeals

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[1] The Second Circuit has since held that habeas corpus is not the proper remedy in *United States ex rel. Lavelle* v. *Fay*, 205 F. 2d 294, 295, concluding:

"The relator may seek a common law writ of error *coram nobis* to challenge the validity of his conviction in the federal court. United States v. Morgan, 2 Cir., 202 F. 2d 67, petition for certiorari granted 345 U.S. 974, 73 S. Ct. 1122, 66 Harv. L. Rev. 1137, and we think that he should be relegated to that remedy. In a proceeding for a writ of error *coram nobis* the United States would be represented by the United States Attorney, a more appropriate counsel than the State Attorney General, who represents the respondent warden here. Moreover, that proceeding would be held before the sentencing court in the district where the records and government officials involved are located. See United States v. Morgan, 2 Cir., 202 F. 2d 67, 68. In United States ex rel. Turpin v. Snyder, 2 Cir., 183 F. 2d 742, relied on by the relator, a writ of habeas corpus was the only way in which the alleged illegality of the first conviction could be challenged. On Lavelle's prior appeal the question of the availability of a common law writ of error *coram nobis* was not raised. United States v. Lavelle, 2 Cir., 194 F. 2d 202; cf. United States v. Bradford, 2 Cir., 194 F. 2d 197, 201, certiorari denied 343 U.S. 979, 72 S. Ct. 1079, 96 L. Ed. 1371."

dismissed respondent's appeal from the denial by the Western District Court of habeas corpus.

Summary of Argument

I

A. A jurisdictional prerequisite to the power of Federal Courts to deprive an accused of his life or liberty is that the accused be aware of his constitutional right to counsel, and if he desire but be unable to obtain counsel, that the court provide him with counsel; or that the Court ascertain that the accused has intelligently waived his right to counsel. A Federal Court which fails to comply with these requirements has not completed its jurisdiction to exercise its power and any judgment pronounced by such a court is void.

B. The demands of the Constitution, as envisaged by this Court have moved Federal and State Courts to acknowledge that due process requires corrective judicial process in the nature of coram nobis be available to expunge a void judgment when all other avenues of judicial relief are unavailable.

Whether by motion or an application for a writ of error coram nobis—a proceeding in the nature of coram nobis is proper in the instant case under the facts here present—to invoke the jurisdiction of the Northern District Court and the holding of the Court below was correct.

II

Congress enacted Title 28 USCA § 2255 to provide "an expeditious remedy for correcting erroneous sentences without resort to habeas corpus" (Revisers Note to Section 2255) for prisoners presently in Federal custody. If as this Court stated in *United States* v. *Hayman* "Nowhere in the history of § 2255 do we find any purpose to impinge

upon prisoners rights of collateral attack upon their convictions" it does not follow that Congress intended to facilitate relief to Federal prisoners and abolish the rights of prisoners in State custody. Clearly § 2255 is only applicable to prisoners in Federal custody. Logically due process requires that corrective judicial procedure in the nature of coram nobis be available to prisoners in state custody wherein the factual situation is similar to those of the instant case.

ARGUMENT

It is in the area of factual situations—such as those present here—that a proceeding in the nature of coram nobis is applicable and its availability undeniable since no other avenues of corrective judicial process are open to the respondent.

I

A judgment of conviction pronounced by a Federal Court which has not complied with the requirements of the Sixth Amendment is void.

The Sixth Amendment of the Constitution of the United States provides in part:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with witnesses against him; to have a compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

This Court has ruled the denial of these constitutional guarantees to be error of such fundamental character as to render the proceedings and any pronouncement of conviction—void.

This Court stated in *Johnson* v. *Zerbst*, 304 U. S. 458, 467:

> "Since the Sixth Amendment constitutionally entitles one charged with crime to the assistance of the Counsel, compliance with this constitutional mandate is an essential jurisdictional prerequisite to a Federal court's authority to deprive an accused of his life or liberty. When this right is properly waived, the assistance of Counsel is no longer a necessary element of the court's jurisdiction to proceed to conviction and sentence. If the accused, however, is not represented by Counsel and has not competently and intelligently waived his constitutional right, the Sixth Amendment stands as a jurisdictional bar to a valid conviction and sentence depriving him of his life or his liberty. A court's jurisdiction at the beginning of trial may be lost 'in the course of the proceedings' due to failure to complete the court—as the Sixth Amendment requires—by providing Counsel for an accused who is unable to obtain Counsel, who has not intelligently waived this constitutional guaranty, and whose life or liberty is at stake. If this requirement of the Sixth Amendment is not complied with, the court has no longer jurisdiction to proceed. The judgment of conviction pronounced by a court without jurisdiction is void * * *"

and in *Rice* v. *Olson* 324 U. S. 786, 788 holding a plea of guilty not to be a waiver stated:

> "A defendant who pleads guilty is entitled to the benefit of counsel, and a request for counsel is not necessary. It is enough that a defendant charged with an offense of this character is incapable adequately of making his defense, that he is unable to get counsel, and that he does not intelligently and understandably waive counsel."

In the instant case, respondent in seeking to expunge his Federal conviction from the record, moved the Northern District Court by alleging "Petitioner begs to state that he was but 19 years of age at the time, had no knowledge

of the law, and was without legal aid, Council (as in original) or representation, he was not advised of his constitutional rights to the same . . . (R. 8). The United States Attorney answered this allegation, admitting "that insofar as the record discloses, the defendant was not represented by Counsel on said arraignment and plea." (R. 12.) The Northern District Court in its Memorandum-Decision acknowledges that the United States Attorney admits that the resopndent's contention is supported by the record. (R. 13.)

If the respondent can prove that he was not aware, nor advised of his right to counsel, and he did not intelligently waive his right to counsel, the judgment of conviction by the Northern District Court was without jurisdiction and void.

Walker v. *Johnston* 312 U. S. 275
Johnson v. *Zerbst* 304 U. S. 458
Walker v. *Alabama* 287 U. S. 45

Such are the Constitutional rights of the respondent as set forth by the earlier pronouncements of this Court and surely a void judgment does not gain validity with age.

B. If, under the facts here present, respondent's conviction in the Northern District Court is void, due process requires that corrective judicial process in the nature of coram nobis be available.

The writ of error coram nobis in the words of Judge Fuld of the Court of Appeals of the State of New York was "conceived by the judiciary of sixteenth century England, born of the necessities of that time."

For accounts of the historical evolution of coram nobis see Fuld, The Writ of Error Coram Nobis, New York Law Journal, June 5, 6, 7, 1950, and 3 Temple L. Q. 365 (1928-29).

This court, early in its history, recognized the availability

of coram nobis to correct judicial errors of a fundamental nature in Pickett's *Heirs* v. *Legerwood*, 7 Pet. 147 stating:

> "The cases for error coram vobis, are enumerated without any material variation in all the books of practice and rest on the authority of the sages and fathers in the law."

Chief Justice Marshall in *Davis* v. *Packard*, 8 Pet. 312 comments that coram nobis was available to an unsuccessful defendant in a New York Court on the ground that he was a consul-general of a foreign power and therefore constitutionally immune from suit.

In *Phillips* v. *Negley*, 117 U. S. 665 this Court again recognized the availability of *coram nobis* as a remedy to rectify errors of a fundamental character which would render a judgment void.

Finally we come to this Court's opinion in *United States* v. *Mayer*, 235 U. S. 55 where after considering the question of a Federal court's power to set aside or alter its judgment after the expiration of the term at which it was entered (Now see Rule 45 (c) Federal Rules of Criminal Procedure) stated page 67:

> "There are certain exceptions. In the case of courts of common law—and we are not here concerned with the special grounds upon which courts of equity afford relief—the court at a subsequent term has power to correct inaccuracies in mere matters of form, or clerical errors, and, in civil cases to rectify such mistakes of fact as were reviewable on writs of error *coram nobis*, or *coram vobis*, for which the proceeding by motion is a modern substitute. Pickett's Heir's v. Legerwood, 7 Pet. 144, 148; Matheson's Adm'r v. Grant's Adm'r, 2 How. 263, 281; Bank of United States v. Moss, supra; Bronson v. Schulten, supra; Phillips v. Negley, supra; In re Wight, 134 U. S. 136; Wetmore v. Karrick, supra. These writs were available to bring before the court

that pronounced the judgment errors in matters of fact which had not been put in issue or passed upon, and were material to the validity and regularity of the legal proceeding itself; as where the defendant, being under age, appeared by attorney, or the plaintiff or defendant was a married woman at the time of commencing the suit, or died before verdict or interlocutory judgment,—for, it was said, 'error in fact is not the error of the judges and reversing it is not reversing their judgment'. So, if there were error in the process, or through the default of the clerks, the same proceeding might be had to procure a reversal. But if the error were 'in the judgment, itself, and not in the process, a writ of error did not lie in the same court upon the judgment but only in another and superior court. Tidd, 9th ed., 1136, 1137; Stephen on Pleading, 119; 1 Roll. Abr. 746, 747, 749. In criminal cases, however, error would lie in the King's Bench whether the error was in fact or law. Tidd, 1137; 3 Bac. Abr. (Boenv. ed.) "Error," 366; Chitty, Crim. L. 156, 749. See United States v. Plumer, 3 Cliff. 28, 59, 60. The errors of law which were thus subject to examination were only those disclosed by the record, and as the record was so drawn up that it did not show errors in the reception or rejection of evidence, or misdirections by the judge, the remedy applied 'only to that very small number of legal questions' which concerned 'the regularity of the proceedings themselves.' See Report Royal Commission on Criminal Code (1879), p. 37; 1 Stephen, Hist. Crim. L. 309, 310.

In view of the statutory and limited jurisdiction of the Federal District Courts, and of the specific provisions for review of their judgments on writ of error, there would appear to be no basis for the conclusion that, after the term, these courts in common law actions, whether civil or criminal, can set aside or modify their final judgments for errors of law; and even if it be assumed that in the case of errors in certain matters of fact, the district courts may exercise in criminal cases—as an incident to their powers expressly granted

—a correctional jurisdiction at subsequent terms analogous to that exercised at common law on writs of error coram nobis (See Bishop, New Crim. Pro., 2d ed., § 1369), as to which we express no opinion, that authority would not reach the present case. This jurisdiction was of limited scope, the power of the Court thus to vacate its judgments for errors of fact existed, as already stated, in those cases where the errors were of the most fundamental character, that is, such as rendered the proceeding itself irregular and invalid."

Whatever be the historical ancestry of the principle that courts lacked jurisdiction over their judgments after the expiration of the term at which judgment was rendered—whether it evolved from the practice to transfer the "rolls" from the courts charge to that of the "treasury" at the expiration of each term—thereby making the correction of errors—"cumbersome bother"—or from whatever the roots stemmed—surely the principle must be referred to in the past tense in the light of the recent enactment of Rule 45 (c) of the Federal Rules of Criminal Procedure:

"Rule 45. Time

(c) Unaffected by expiration of term. The period of time for the doing of any act or the taking of any proceeding is not affected or limited by the expiration of a term of court. The expiration of a term of court in no way affects the power of a court to do any act in a criminal proceeding."

In *Waley* v. *Johnston*, 316 U. S. 101 this Court vacated a judgment of the Court of Appeals for the Ninth Circuit which had affirmed the district courts denial of habeas corpus and impliedly acknowledged the existence of the writ of *coram nobis* by considering the issue in the case as being one involving the question of res judicata.

And again in *United States* v. *Smith*, 331 U. S. 469 by way of comment in note 4 page 475 the Court did not abolish

coram nobis but in the absence of the facts as are presented by the instant case—concluded:

> "Of course, the federal courts have power to investigate whether a judgment was obtained by fraud and make whatever modification is necessary, at any time. Universal Oil Co. v. Root Refining Co., 328 U. S. 575."

The power of Federal District Court to entertain proceedings in the nature of *coram nobis* has been recognized by many of the appellate courts.

Robinson v. *Johnston*, 118 F. 2d 998, (C.A. 9), certiorari denied, 314 U. S. 675, judgment vacated and cause remanded 316 U. S. 649;
Tinkoff v. *United States*, 129 F. 2d 21 (C. A. 7);
Garrison v. *United States*, 154 F. 2d 106 (C. A. 5);
Spaulding v. *United States*, 155 F. 2d 919 (C. A. 6);
Roberts v. *United States*, 158 F. 2d 150 (C. A.);
United States v. *Steese*, 144 F. 2d 439 (C. A. 3).

As Judge Goodrich reasoned in the *Steese* case at page 442:

> "Certain it is that a time for a motion for a new trial or for an appeal has long since passed. . . . We think, however, a court is not helpless to remedy an injustice, if one is proved to have been committed, which goes to the extent of depriving a man of his constitutional rights. The motion in the particular case may be treated for this purpose, as a modern substitute for the ancient writ of error coram nobis."

Judge Biggs sitting with Judge Goodrich on the *Steese* case and concurring in the result—found a Congressional grant of power to Federal Courts as a basis for *coram nobis* under the All Writs Statute:

> "The United States goes further, however, and contends that Section 262 ('All Writs') of the Judicial

Code, 28 U.S.C.A. § 377, does not authorize a district court of the United States to issue the writ of error coram nobis, citing McClung v. Silliman, 6 Wheat. 598, 5 L. Ed. 340; United States v. More, 3 Cranch 159, 172, 2 L. Ed. 397; Fink v. O'Neil, 106 U.S. 272, 280, 1 S. Ct. 325, 27 L. Ed. 196. None of the decisions cited is really apposito, but that of McClung v. Silliman requires some consideration. In the McClung case, 6 Wheat. 601, 5 L. Ed. 340, Mr. Justice Johnson stated that 'The 14th section of the (Judiciary) act (of 1789, 1 Stat. 73, whence stems the present 'All Writs' Section) under consideration could only have been intended to vest the power (to issue a writ of mandamus) * * * in cases where the jurisdiction already exists, and not where it is to be courted or acquired, by means of the writ proposed to be sued out. * * *"

"Arguing from the McClung case, the government asserts that at the English common law the writ of error coram nobis commenced an entirely new proceeding, citing 2 Bouv. Law Dict., Rawle's Third Revision, 'Writ of Error,' p. 3498, and basing its argument upon much of what was said by Circuit Justice Clifford in United States v. Plumer, 27 Fed. Cas. at pages 573, 574, No. 16,056.

"The authorities cited and the arguments made in the Plumer case need not be repeated here. While the writ of error coram nobis came into existence as an 'original' writ in the sense that it was a writ by which a new proceeding was commenced, so likewise did the writ of scire facias and the writ of mandamus, but these writs, like the writ of error coram nobis, have been employed many times as auxiliary to the jurisdiction of a court in a pending suit. See Winder v. Caldwell, 14 How. 434, 14 L. Ed. 487; Ewing v. United States, 6 Cir., 240 F. 241; Marbury v. Madison, 1 Cranch 137, 175, 2 L. Ed. 60. Original jurisdiction for the purpose of adjudicating criminal cases was conferred on the district courts of the United States by Section 24 of the Judicial Code, 28 U.S.C.A. § 41, and the same section conferred original jurisdiction on these courts to ad-

judicate civil causes. I think that in the exercise of either jurisdiction the district courts may employ any and all writs appropriate in aid of the jurisdiction conferred upon them by Section 24 of the Judicial Code.

"To hold otherwise would place Rule 60(b) of the Federal Rules of Civil Procedure, 28 U.S.C.A. following section 723c, providing for the relieving of judgments procured by surprise or excusable neglect, a true 'correctional jurisdiction,' in peril. The rule applies to the correction of inadvertences or misprisons of the clerk which always could be rectified after the end of the term, but it goes further and may serve to relieve of a judgment procured by surprise or because of the excusable neglect of a party or his legal representative after the end of the term. Cavallo v. Agwilines, Inc., D.C. 2 F.R.D. 526; McGinn v. United States, 2 F.R.D. 562, 563. Compare Section 473 of the California Code of Civil Procedure (Deering, 1937), former Equity Rule 72, 28 U.S.C.A. § 723 Appendix, and the provisions of Rule 6(c) of the Rules of Civil Procedure, 28 U.S.C.A. following section 723c. See Moore's Federal Practice, Volume 3, pp. 3254-3257, and Preveden v. Hahn, D.C., 36 F. Supp. 952. In the case last cited the District Court of the United States for the Southern District of New York held that the relief afforded by Rule 60(b) was analogous to that formerly given by the writ of error coram nobis. The Rules of Civil Procedure were adopted by the Supreme Court pursuant to the rule-making Act of 1934, 48 Stat. 1064, 28 U.S.C.A. §§ 723b, 723c. In adopting the Rules the Supreme Court did not effect changes in the substantive law and it seems to have assumed the existence of a jurisdiction or power in the district courts to effect by motion the relief formerly granted upon the issuance of a writ of error coram nobis."

Since Judge Biggs' consideration of the power granted to Federal Courts under former Section 262, Congress has seen fit to expand the power conferred upon Federal Courts in the 1948 revision—by granting them not only power to

issue "necessary" writs but in addition all "appropriate" writs—so that the statute now reads:

> "* * * all courts established by act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U. S. C. A. 1651 (a).

The Revisors Note accompanying this expanded provision states:

> "The revised section extends the power to issue writs in aid of jurisdiction to all courts established by act of Congress, thus making explicit the right to exercise powers implicit from the creation of such courts."

Indeed, in May 1948, one month prior to the expansion by Congress of the "All Writs" statute into its present form, this Court interpreted Section 262 of the Judicial Code, from which the present statute was adopted, with the following succinct statement:

> "In short, we do not read Section 262 as an ossification of the practice and procedure of more than a century and a half ago. Rather, it is a legislatively approved source of procedural instruments designed to achieve the 'rational ends of law.'"
>
> *Price* v. *Johnston*, 334 U. S. 266, 282.

If the respondent can prove he was unaware and not advised of his right to counsel when he was convicted by the Northern District Court—then clearly—such conviction is void.

The respondent is presently confined in a New York State prison as a second felony offender—the basis of which is the prior federal conviction—respondent presently contends is void.

The Courts of New York State will not—as they should not—sit as a tribunal in review of the regularity of convic-

tions of other jurisdictions. See *People* v. *McCullough*, 300 N. Y. 107 rendered *after* this Court's decision in *Gayes* v. *New York*, 332 U. S. 145.

Habeas corpus—inappropriate in the instant case—has even been denied.

There are no other avenues of relief available to respondent.

The respondent is entitled to a hearing on the merits of his contentions—which has raised doubts in both courts below as to the regularity of the earlier proceedings in the Northern District Court.

Surely, due process requires that judicial process in the nature of coram nobis be available to the respondent under the facts here present.

II

The Court has thoroughly considered the legislative history and purpose of Section 2255 in the *Hayman* case. The petitioner here, being the petitioner there, supplied the Court with a comprehensive appendix to its brief which traced the conception of Section 2255 "The minds of the judiciary in 1942 to its Legislative birth in 1948."

This Court, in reviewing the historical motivations for the enactment of this section, first considered its need and then its legislative history, concluding:

> "Nowhere in the history of Section 2255 do we find any purpose to impinge upon prisoners' rights of collateral attack upon their convictions. On the contrary, the sole purpose was to minimize the difficulties encountered in habeas corpus proceedings by affording the same rights in another and more convenient form." (342 U. S. 206, 214).

As the caption of Section 2255 clearly states, and as the initial sentence to the section clearly indicates, it is appli-

cable only to factual situations wherein "a prisoner" is "in custody under sentence of a court established by an act of Congress . . ."

The respondent is not presently in Federal custody. He is, however, in state custody and claims that the additional punishment which keeps him confined was pronounced on the basis of a prior Federal conviction which he contends is void.

Logically, Congress, in an attempt to rectify administrative difficulties burdening certain district courts which include within their geographic jurisdiction federal prisons enacted Section 2255. Coram nobis proceedings are directed to the sentencing court.

The petitioner contends, that by the enactment of section 2255 Congress intended to occupy the entire field of attacks upon Federal convictions. If such was the intent of Congress, then why did the Congress itself delimit the applicability of the section to prisoners in Federal custody? The intent of Congress in legislating Section 2255 was to provide "an expeditious remedy for correcting erroneous sentences without resort to habeas corpus."

A Congressional intent to expand the right and more readily enable erroneous sentences to be corrected is patently revealed in the initial sentence to paragraph 3 of Section 2255 by which the scope of the investigation by the court of the prisoners contentions is greatly enlarged—compared to that available under habeas corpus.

Paragraph 3 begins:

> "Unless the motion and the files and the records of the case *conclusively* show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, to grant a prompt hearing thereon, and determine the issues and make findings of fact and conclusions of law with respect thereto . . ."

These are expanding concepts of justice.

It cannot be argued that the Congress is only concerned in the Constitutional rights of federal prisoners and not those of state prisoners.

If Congress was desirous of impinging upon state prisoners rights of collateral attack upon their convictions the Congress could have expressly so stated. Congress was aware of the cases cited herein establishing the existence of coram nobis in federal courts. The intent to abolish "rights" is not to be determined from omission to so expressly state. There is no inconsistency in the coexistence of section 2255 and proceedings in the nature of coram nobis.

Congressional intent to occupy an area is not determined by the limitation Congress itself places upon this legislation in restricting it to prisoners in Federal custody.

It is in the area of factual situations, such as those presented in the instant case, that a proceeding in the nature of coram nobis is applicable and its existence undeniably necessary.

A void conviction does not gain validity with age.

With the passage of time—and the opportunity to consider expanding concepts of what are termed "constitutional rights" this Court has determined that a judgment of conviction—depriving an accused of his liberty is void unless the accused was aware of his right to counsel.

The question of an accused's "awareness" of his right to counsel is one of fact—a determination which is relatively subjective. It's evidence of course may be determined in the manner by which other subjective questions of fact are determined in the law. Here as is stated by the court below—the record tends to substantiate the respondents "unawareness"—and his "unawareness" as this Court has held—vitiates the court's jurisdiction.

The question of the validity of respondent's prior federal conviction can only be determined at a hearing. That is what he seeks!

The petitioner would deny him a hearing leaving the respondent with no avenue of judicial relief available. Such a situation is irreconcilable with the concepts of due process.

It is the pronouncements of this Court which have catalysted the courts of the several but United States[2] to find within their power the jurisdiction to expunge void judgments.

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[2] *People* v. *Richetti*, 302 N. Y. 290, 295.

"Fundamental concepts of due process, decisions of the United States Supreme Court and of our own court, and the very nature of the coram nobis type of relief—all demand a trial of such sworn assertions. The possibility, or probability, that such trials will be numerous, is no answer at all, and will not be further noticed herein. Likewise, as to the fact that defendant is a convict, and the opposing affiants court officers. Defendant has been denied his day in court, and we must see that he has it, be he right or wrong, truthful or lying, good citizen or bad. We do comment, however, that power in a court to deny hearings in such cases might sometimes work out to the opposite result and one distasteful to the prosecution. If relief can be denied without a trial, may it not be granted to the prisoner in similar summary fashion?

"We thank the United States Supreme Court decided this case for us when, in Rice v. Olson, 324 U.S. 786, 789, 65 S. Ct. 989, 991, 89 L. Ed. 637, it said, of a disputed contention like that advanced here, that it 'must be determined by evidence where the facts are in dispute.' Several years earlier, in Walker v. Johnston, 312 U. S. 275, 286-287, 61 S. Ct. 574, 579, 85 L. Ed. 830, the court remarked, as to the sworn statements in a convicts petition: 'It is true that they are denied in the affidavits filed with the return to the rule, but the denials only serve to make the issues which must be resolved by evidence taken in the usual way.' An identical ruling was made by the same court in Waley v. Johnston, 316 U. S. 101, 104, 62 S.Ct. 964, 86 L. Ed. 1302. True enough the Walker and Waley cases were in habeas corpus, not *coram nobis* but that difference is procedural only. Those very cases were cited by us in our own leading *coram nobis* case of Matter of Lyons v. Goldstein, 290 N. Y. 19, 25, 47 N. E. 2d 425, 428, 146 A.L.R. 1422, of which more hereafter, as authority for the proposition that due process can be satisfied only when a person may be granted a hearing upon the merits before a competent tribunal where he may appear and assert and protect his rights."

Surely under the facts here present due process requires that judicial relief in the nature of coram nobis be available to the respondent.

Conclusion

For all of the foregoing reasons, it is respectfully submitted that the judgment of the Court of Appeals should be affirmed.

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Jacob Abrams,
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